

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

8 CHAD McCLURE,)
9 Plaintiff,) No. CV-06-0293-CI
10 v.) ORDER GRANTING PLAINTIFF'S
11 MICHAEL J. ASTRUE,) MOTION FOR SUMMARY JUDGMENT
12 Commissioner of Social) AND DENYING DEFENDANT'S
13 Security,) MOTION FOR SUMMARY JUDGMENT
14 Defendant.)
15)

16 BEFORE THE COURT are cross-Motions for Summary Judgment (Ct.
17 Rec. 13, 16.) Attorney Maureen Rosette represents Plaintiff;
18 Special Assistant United States Attorney Jeffrey Baird represents
19 Defendant. The parties have consented to proceed before a
20 magistrate judge. (Ct. Rec. 7.) After reviewing the administrative
21 record and briefs filed by the parties, the court **GRANTS** Plaintiff's
22 Motion for Summary Judgment, and remands the matter to the
23 Commissioner for additional proceedings.

JURISDICTION

25 On September 19, 2003, Plaintiff Chad L. McClure (Plaintiff)
26 applied for Disability Insurance benefits and Social Security Income
27 (SSI) benefits. (Tr. 67, 485.) Plaintiff alleged disability due to
28 bipolar depression, arthritis, neck and back pain, shoulder injury,

1 insomnia, asthma, and migraines, with an onset date of January 20,
2 2002. (Tr. 119, 485.) Benefits were denied initially and on
3 reconsideration. Plaintiff requested a hearing before an
4 administrative law judge (ALJ), which was held before ALJ R. J.
5 Payne on May 9, 2006. (Tr. 503-42.) Plaintiff, who was represented
6 by counsel, and medical expert Allen D. Bostwick, Ph.D., testified.
7 The ALJ denied benefits and the Appeals Council denied review. (Tr.
8 7-9.) The instant matter is before this court pursuant to 42 U.S.C.
9 § 405(g).

10 **STATEMENT OF THE CASE**

11 The facts of the case are set forth in detail in the transcript
12 of proceedings, and are briefly summarized here. Plaintiff was 33
13 years old at the time of the hearing. He was single, without
14 children. He had a high-school degree and a Bachelor of Arts degree
15 from Eastern Washington University. (Tr. 515.) He testified he had
16 past work experience as a landscape laborer, maintenance laborer and
17 grocery stocker. (Tr. 516, 521.) He also reported work as a
18 busboy, server, cashier, clerk, and delivery truck driver. (Tr.
19 104.) He stated he could no longer work due to mental and physical
20 pain, arthritis and a concern that he was losing his sanity. (Tr.
21 522-23.) He testified he had panic attacks everyday, even though he
22 was on medication. (Tr. 525-26.) He stated he could sit 20
23 minutes, stand a couple of minutes and walk six blocks to the store
24 and back; bending caused "excruciating" pain. (Tr. 530-533.) He
25 reported his activities of daily living consisted of watching
26 television, reading, and minimal cooking. He stated he did not
27 clean house and did laundry once every two months. (Tr. 537-38,
28

1 541.) He testified he was estranged from family and had few friends
 2 at the time of the hearing. (Tr. 523.)

3 **ADMINISTRATIVE DECISION**

4 At step one, ALJ Payne found Plaintiff had not engaged in
 5 substantial gainful activity during the relevant time. (Tr. 20.)
 6 At step two, he found Plaintiff had severe impairments of substance
 7 abuse/dependency disorders for alcohol and cannabis (at least
 8 through December 2003), affective disorder (schizoaffective), and
 9 anxiety-related disorder, NOS. (Id., Finding 3.) Considering the
 10 evidence without the effects of substance abuse at step two, the ALJ
 11 found "the remaining limitations [without the effects of substance
 12 abuse] would cause more than a minimal impact on the claimant's
 13 ability to perform basic work activities, and the claimant would
 14 continue to have a severe impairment or combination of impairments."
 15 (Tr. 22, Finding 5.) At step three, he found "other than Section
 16 Listing 12.09 for substance abuse disorders," the claimant did not
 17 have a medical condition which alone or in combination, met or
 18 medically equaled an administratively recognized level impairment
 19 listed in Appendix 1, Subpart P, Regulations No. 4 (Listings). (Tr.
 20 22, Finding 4.)

21 At step four, the ALJ determined that, with the effects of
 22 substance abuse disorders, Plaintiff had the residual functional
 23 capacity (RFC) for work at the medium exertional level, subject to
 24 the following "moderate" social functional limitations: "interacting
 25 with the general public; getting along with co-workers without
 26 distraction or exhibiting behavior extremes; and maintaining
 27 socially appropriate behavior and basic standards of
 28

1 neatness/cleanliness." (Tr. 22, Finding 6.) The ALJ did not make
 2 RFC findings absent the effects of substance abuse. He found
 3 Plaintiff's allegations not entirely credible. (Tr. 23.)

4 Finding Plaintiff's past work as a laborer, restaurant busboy,
 5 janitor, cashier, cook and delivery driver required only "limited"
 6 interaction with others "including the public co-workers and
 7 supervisors," the ALJ determined Plaintiff could perform his past
 8 work. (Id.) The ALJ proceeded, in the alternative, to step five.
 9 He found Plaintiff's "non-exertional social limitations have little
 10 or no effect" on Plaintiff's occupational base of unskilled medium
 11 work. (Tr. 24.) Applying the Medical-Vocational Guidelines (Grids),
 12 he found there were a significant number of jobs in the national
 13 economy that Plaintiff could perform; therefore, Plaintiff was not
 14 found "disabled," as defined by the Social Security Act. (Tr. 24.)

15 **STANDARD OF REVIEW**

16 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 17 court set out the standard of review:

18 A district court's order upholding the Commissioner's
 19 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 20 Commissioner may be reversed only if it is not supported
 by substantial evidence or if it is based on legal error.
 21 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
 22 Substantial evidence is defined as being more than a mere
 scintilla, but less than a preponderance. *Id.* at 1098.
 23 Put another way, substantial evidence is such relevant
 evidence as a reasonable mind might accept as adequate to
 support a conclusion. *Richardson v. Perales*, 402 U.S.
 389, 401 (1971). If the evidence is susceptible to more
 24 than one rational interpretation, the court may not
 substitute its judgment for that of the Commissioner.
 25 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner*, 169
 F.3d 595, 599 (9th Cir. 1999).

26 The ALJ is responsible for determining credibility,
 27 resolving conflicts in medical testimony, and resolving
 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 28

1 Cir. 1995). The ALJ's determinations of law are reviewed
 2 *de novo*, although deference is owed to a reasonable
 3 construction of the applicable statutes. *McNatt v. Apfel*,
 4 201 F.3d 1084, 1087 (9th Cir. 2000).

5 **SEQUENTIAL PROCESS**

6 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 7 requirements necessary to establish disability:

8 Under the Social Security Act, individuals who are
 9 "under a disability" are eligible to receive benefits. 42
 10 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 11 medically determinable physical or mental impairment"
 12 which prevents one from engaging "in any substantial
 13 gainful activity" and is expected to result in death or
 14 last "for a continuous period of not less than 12 months."
 15 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 16 from "anatomical, physiological, or psychological
 17 abnormalities which are demonstrable by medically
 18 acceptable clinical and laboratory diagnostic techniques."
 19 42 U.S.C. § 423(d)(3). The Act also provides that a
 20 claimant will be eligible for benefits only if his
 21 impairments "are of such severity that he is not only
 22 unable to do his previous work but cannot, considering his
 23 age, education and work experience, engage in any other
 24 kind of substantial gainful work which exists in the
 25 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
 26 the definition of disability consists of both medical and
 27 vocational components.

28 In evaluating whether a claimant suffers from a
 1 disability, an ALJ must apply a five-step sequential
 2 inquiry addressing both components of the definition,
 3 until a question is answered affirmatively or negatively
 4 in such a way that an ultimate determination can be made.
 5 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 6 claimant bears the burden of proving that [s]he is
 7 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
 8 1999). This requires the presentation of "complete and
 9 detailed objective medical reports of h[is] condition from
 10 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
 11 404.1512(a)-(b), 404.1513(d)).

12 It is the role of the trier of fact, not this court, to resolve
 13 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
 14 supports more than one rational interpretation, the court may not
 15 substitute its judgment for that of the Commissioner. *Tackett*, 180
 16

1 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
2 Nevertheless, a decision supported by substantial evidence will
3 still be set aside if the proper legal standards were not applied in
4 weighing the evidence and making the decision. *Brawner v. Secretary*
5 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
6 there is substantial evidence to support the administrative
7 findings, or if there is conflicting evidence that will support a
8 finding of either disability or non-disability, the finding of the
9 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
10 1230 (9th Cir. 1987).

11 ISSUES

12 The question is whether the ALJ's decision is supported by
13 substantial evidence and free of legal error. Plaintiff argues the
14 ALJ erred when he (1) failed to provide specific and legitimate
15 reasons for rejecting examining physician opinions (Ct. Rec. 14 at
16 8), and (2) improperly relied on the non-examining medical expert's
17 opinion. (Id. at 9).

18 DISCUSSION

19 A. Two-Step Sequential Evaluation in the Context of Substance 20 Abuse

21 Where drug and/or alcohol abuse (DAA) is a consideration during
22 disability proceedings, the Regulations implemented by the
23 Commissioner require the ALJ to follow a specific two-step analysis.
24 20 C.F.R. § 404.1535(a), 416.935(a). First, the ALJ must conduct
25 the five-step sequential evaluation without attempting to determine
26 the impact of DAA. If the ALJ finds that the claimant is not
27 disabled under the five-step inquiry, the claimant is not entitled
28

1 to benefits, and there is no need to proceed with further analysis.
 2 Id. If the ALJ finds that claimant is disabled, and there is
 3 evidence that DAA is a contributing factor material to disability,
 4 the ALJ should proceed under the sequential evaluation and §
 5 404.1535 or 416.935 to determine if the claimant would still be
 6 disabled if he stopped using drugs and alcohol. *Bustamante v.*
 7 *Massanari*, 262 F.3d 949, 955 (9th Cir. 2001).

8 Here, at step three, the ALJ found that "other than Section
 9 Listing 12.09 for substance abuse disorders," Plaintiff did not meet
 10 the Listings. This is construed as a finding that Plaintiff met
 11 Listing 12.09.¹ (Tr. 22.) However, Listing 12.09 can only be met
 12 if at least one of the referenced Listings is met (e.g., sections
 13 12.04, 12.06 or 12.08). See *supra* n.1. Because the ALJ did not
 14 identify which referenced Listing was met, the ALJ's step three
 15

16 ¹ Pursuant to Section 12.09, disabling substance addiction
 17 disorders are evidenced by:

18 Behavioral changes or physical changes associated with the
 19 regular use of substances that affect the central nervous
 system.

20 The required level of severity for these disorders is met
when the requirements in any one of the following (A
 21 through I) are satisfied.

22 A. Organic mental disorders. Evaluate under 12.02.
 23 B. Depressive disorders. Evaluate under 12.04.
 24 C. Anxiety disorders. Evaluate under 12.06.
 25 D. Personality disorders. Evaluate under 12.08.
 26 E. Eperipheral neuropathies. Evaluate under 11.14.
 27 F. Liver damage. Evaluate under 5.05.
 28 G. Gastritis. Evaluate under 5.04.
 H. Pancreatitis. Evaluate under 5.08
 I. Seizures. Evaluate under 11.02 or 11.03.

20 C.F.R. Part 404, Subpart P, App. 1, Section 12.09. (Emphasis
 added.)

1 finding is incomplete. Furthermore, even if this omission were
2 found "harmless error," and the ALJ's finding that with the effects
3 of DAA, Plaintiff met the Listings for sections 12.09, 12.04 and
4 12.06 (as supported by Dr. Bostwick's testimony (Tr. 474) and other
5 evidence in the record (Tr. 342, 228, 466)), a determination of
6 "disabled" would necessarily follow. 20 C.F.R. §§ 404.1525, 416.925
7 (Appendix 1 lists impairments severe enough to prevent an individual
8 from performing substantial gainful activity). The ALJ erred when
9 he failed to find the Plaintiff "disabled" with the effects of
10 substance abuse.

11 When a claimant is ineligible for benefits because DAA is a
12 contributing factor material to his disability determination, the
13 ALJ then must conduct a second sequential analysis without the
14 effects of DAA. *Bustamante*, 262 F.3d at 955 (a finding of
15 disability is a condition precedent to an application of 20 C.F.R.
16 §§ 404.1535 and 416.935). Here, after finding, albeit incompletely,
17 that Plaintiff met a Listing (and was therefore disabled), the ALJ
18 found: "[B]ased on all of the impairments, including the substance
19 use disorder(s), the claimant has the residual functional capacity
20 for work at the medium exertional level." (Tr. 22.) (Emphasis
21 added.) This finding is inconsistent with the ALJ's previous
22 finding that Plaintiff met Listing 12.09 (i.e., was unable to
23 perform substantial gainful activity). Further, having found
24 Plaintiff was disabled, the ALJ failed to make required RFC findings
25 without the effects of substance abuse disorders, as required by
26 *Bustamante*.

27 In sum, the ALJ's decision does not reflect the Commissioner's
28 regulations outlining sequential evaluation in a disability

1 determination proceeding where substance abuse disorders are severe
2 impairments. Because of additional legal errors in the sequential
3 evaluation, discussed below, the DAA analysis cannot be considered
4 an error of "opinion writing" rather than law. *See Brueggemann v.*
5 *Barnhart*, 348 F.3d 689, 694 (8th Cir. 2003). These legal errors
6 require reversal and remand for a complete and accurate two-step
7 sequential evaluation, with and without the effects of substance
8 abuse, required by *Bustamante*, 20 C.F.R. §§ 404.1535, 416.935, and
9 20 C.F.R. Part 404, Subpart P, App. 1, Section 12.09.

10 **B. Credibility**

11 The ALJ found Plaintiff's allegations concerning the effects of
12 his symptoms were not entirely credible. (Tr. 23.) A credibility
13 determination must be supported by findings sufficiently specific to
14 permit the court to conclude the ALJ did not arbitrarily discredit
15 claimant's testimony. *Bunnell v. Sullivan*, 947 F.2d 341, 345-46
16 (9th Cir. 1991) (en banc). The ALJ may consider a claimant's
17 reputation for truthfulness, inconsistencies either in testimony or
18 between his testimony and conduct, his daily activities, work
19 record, and testimony from physicians and third parties concerning
20 the alleged symptoms. *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792
21 (9th Cir. 1997). If there is no affirmative evidence that the
22 claimant is malingering, the ALJ must provide "clear and convincing"
23 reasons for rejecting the claimant's testimony regarding the
24 severity of symptoms. *Reddick v. Chater*, 157 F.3d 715, 722 (9th
25 Cir. 1998). An independent review of the record by the court
26 indicates the ALJ's findings are not "clear and convincing."
27 Plaintiff's ability to follow up with medication management and
28

1 unspecified reports of stability during the relevant period are not
 2 legitimate reasons to discount a claimant's credibility. (Tr. 23.)
 3 On remand, the ALJ shall make new credibility findings. *See Thomas*
 4 *v. Barnhart*, 278 F.3d 945, 958 (9th Cir. 2002).

5 **C. Medical Opinions**

6 Plaintiff argues the ALJ improperly rejected the medical
 7 opinions of his examining physicians. In disability proceedings, a
 8 treating or examining physician's opinion is given more weight than
 9 that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d
 10 587, 592 (9th Cir. 2004). If a treating or examining physician's
 11 opinion is not contradicted, it can be rejected only with "clear and
 12 convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
 13 1995). If contradicted, the ALJ may reject the opinion if he states
 14 specific, legitimate reasons that are supported by substantial
 15 evidence. *See Flaten v. Secretary of Health and Human Services*, 44
 16 F.3d 1453, 1463 (9th Cir. 1995).

17 In addition to medical reports in the record, the analysis and
 18 opinion of a non-examining medical expert selected by the ALJ may be
 19 helpful in his adjudication. *Andrews*, 53 F.3d at 1041. Testimony
 20 of a medical expert may serve as substantial evidence only when
 21 supported by other evidence in the record. *Id.*

22 Historically, the courts have recognized conflicting medical
 23 evidence, the absence of regular medical treatment during the
 24 alleged period of disability, and the lack of medical support for
 25 doctors' reports based substantially on a claimant's subjective
 26 complaints, as specific, legitimate reasons for disregarding an
 27 examining physician's opinion. *See Flaten*, 44 F.3d at 1463-64; *Fair*
 28 *v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989).

1 The record includes medical opinions from several acceptable
2 medical sources: examining physicians Debra Brown, Ph.D., Kimberly
3 Dorin, Ph.D., Pat Jarvis, M.D., and Shoshanna Press, M.D., all of
4 whom rendered opinions on the severity of Plaintiff's mental
5 disorder. (Tr. 223, 261, 265, 367.) Although Dr. Jarvis diagnosed
6 alcohol and cannabis abuse, he specifically opined the alcohol and
7 marijuana use "do not appear to create appreciable limitations."
8 (Tr. 227.) He found mild to moderate limitations "with respect to
9 employment." (Id.) Drs. Dorin and Press assessed Plaintiff when he
10 was actively abusing alcohol and marijuana (Tr. 264, 267-68, 280);
11 therefore, their opinions regarding Plaintiff's limitations would
12 not apply to the ALJ's second step analysis, without the effects of
13 alcohol.

14 In August 2005, Debra Brown, Ph.D., examined Plaintiff and
15 administered objective testing. The results showed no evidence of
16 malingering. Dr. Brown noted symptoms of bipolar disorder, panic
17 and paranoia. (Tr. 374.) She did not note substance abuse as a
18 problem. Plaintiff reported to Dr. Brown that he had not had a
19 problem for years. (Tr. 372.) This evidence is consistent with the
20 ALJ's finding that the effects of DAA were most significant up to
21 December 2003. (Tr. 20, 21.) Dr. Brown concluded Plaintiff was not
22 employable at the time, and had marked limitations in his ability to
23 exercise judgment and make decisions, perform routine tasks, relate
24 appropriately to co-workers and supervisors, interact appropriately
25 in public contacts, and respond appropriately and tolerate the
26 pressures of a normal work setting. (Tr. 369, 374.) She also
27 stated his paranoia may make it difficult for him to receive
28 treatment. (Tr. 374.)

1 In evaluating Dr. Brown's opinions, the ALJ stated only that,
 2 at that time "even when [Plaintiff] was not taking his medication,
 3 he was stable and able to interact with others as evidenced by his
 4 ability to continue following-up, and the seeking of medical care
 5 for other ailments." (Id.) He did not specifically reject Dr.
 6 Brown's opinions that Plaintiff had marked cognitive and social
 7 functional limitations. Plaintiff's ability to follow-up with
 8 appropriate medical care is not inconsistent with his diagnosed
 9 impairments and, therefore, not a specific and legitimate reason to
 10 disregard or reject Dr. Brown's opinions. *See Flaten*, 44 F.3d at
 11 1463-64.

12 Referencing Family Services Spokane treatment notes by Michael
 13 Dobler, MSW, from this time period, the ALJ also concluded Plaintiff
 14 was "much improved, with good mood and insight, and logical
 15 progressive thoughts." (Tr. 21, 388.) Observations by a mental
 16 health counselor, who counseled Plaintiff for about one month on
 17 family of origin issues, are not sufficiently "clear and convincing"
 18 reasons to reject an examining psychologist's opinion. *See Lester*,
 19 81 F.3d at 830.

20 In addition to the medical opinions in the record, the ALJ must
 21 consider observations by other sources as to "how an impairment
 22 affects a claimant's ability to work." *Sprague*, 812 F.2d at 1232.
 23 If rejected, the ALJ must give specific reasons germane to each
 24 witness. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). The
 25 opinions of Donna Poole, ARNP, (Tr. 218-19) and Barbara Tritt, PA-C,
 26 (Tr. 365) that Plaintiff's impairments significantly interfered with
 27 his ability to work are considered "other source" opinions under the
 28 Regulations. 20 C.F.R. § 404.1513(d). Nurse Poole counseled

1 Plaintiff from October 2001 to September 2002, and was thus able to
 2 observe Plaintiff over a significant period of time. She noted that
 3 Plaintiff was using drugs and alcohol to self-medicate his mood
 4 disorder, and in her opinion, the substance abuse did not exacerbate
 5 his mental problems. She also observed, as his depression was being
 6 treated, signs and symptoms of social phobia were emerging. (Tr.
 7 219.) The ALJ did not address specifically Nurse Poole's
 8 observations or those of Barbara Tritt, PA-C, who reported in August
 9 2005, that Plaintiff's psychological problems were significantly
 10 interfering with ability to his functioning in society. (Tr. 424,
 11 427.)

12 On remand, the ALJ must explain what weight, if any, he gave to
 13 the opinions of each examining medical source and other source in
 14 his two-step analysis, with and without the effects of DAA, and give
 15 legally sufficient reasons for discounting opinion evidence.
 16 Further, if the ALJ relies on medical expert advice, he must explain
 17 which other medical evidence in the record supports the non-
 18 examining, medical expert opinions. *See Magallanes v. Bowen*, 881
 19 F.2d 747, 751 (9th Cir. 1989)

20 **D. Step Four - RFC Findings and Past Relevant Work**

21 At step four, the Commissioner makes RFC findings, and
 22 determines if a claimant can perform past relevant work. Although
 23 the burden of proof lies with the claimant at step four, the ALJ
 24 still has a duty to make the requisite factual findings to support
 25 his conclusion. *SSR 82-62*. This is done by looking at the
 26 "residual functional capacity and the physical and mental demands"
 27 of the claimant's past relevant work. 20 C.F.R. §§
 28 404.1520(a)(4)(iv) and 416.920 (a)(4)(iv). Past relevant work is

1 work performed in the last 15 years, lasted long enough to learn it
 2 and was substantial gainful employment. *SSR 82-61*. In finding that
 3 an individual has the capacity to perform a past relevant job, the
 4 decision must contain among the findings the following specific
 5 findings of fact:

6 1. A finding of fact as to the individual's residual
 7 functional capacity;²

8 2. A finding of fact as to the physical and mental demands of
 9 the past job/occupation; and

10 3. A finding of fact that the individual's residual
 11 functional capacity would permit a return to his or her past job or
 12 occupation. *SSR 82-62*.

13 These findings must be based on the evidence in the record and
 14 must be developed and fully explained in the disability decision.
 15 Evidence of the physical and mental requirements of a particular job
 16 may be found in the *DICTIONARY OF OCCUPATIONAL TITLES* (DICOT), other
 17 administratively recognized publications, or vocational expert
 18 testimony. *SSR 82-61*. Vocational experts are used most often at an
 19 ALJ hearing. *SSR 00-4p*. Step four requires specific findings on
 20 all three points sufficient "to insure that the claimant really can
 21 perform his past relevant work." *Pinto v. Massanari*, 249 F.3d 840,
 22 845 (9th Cir. 2001); *see also SSR 00-40*.

23

24 ² On remand, if the ALJ in his first analysis of Plaintiff's
 25 impairments, with the effects of DAA, determines that Plaintiff is
 26 disabled, (i.e., meets Listing 12.09 and a referenced Listing), the
 27 step four findings will be necessarily without the effects of DAA.
 28 *See Bustamante*, 262 F.3d at 955.

1 **1. RFC Findings**

2 The ALJ found:

3 After careful consideration of the entire
 4 record, the undersigned finds that, based on all
 5 of the impairments, including the substance use
disorders(s), the claimant has the residual
 6 functional capacity for work at the medium
 7 exertional level, subject to the following
 8 "moderate" social functional limitations for:
 9 interacting with the general public; getting
 10 along with co-workers without distraction or
 11 exhibiting behavior extremes; and maintaining
 12 socially appropriate behavior and basic
 13 standards of neatness/ cleanliness.

14 (Tr. 22, Finding 6.) (Emphasis added.)

15 As discussed above, this RFC finding with the effects of
 16 substance abuse disorders, which the ALJ initially found disabling
 17 (Tr. 22), contradicts a finding of disability and is unnecessary.
 18 What the Commissioner's regulations require is a fully-explained RFC
 19 determination without the effects of substance abuse so the ALJ may
 20 make adequate step four findings regarding Plaintiff's ability to do
 21 past relevant work or other work. Where, as here, DAA has been
 22 found a contributing factor material to Plaintiff's disability (Tr.
 23 21), and there are no RFC findings absent the effects of alcohol,
 24 the ALJ's step four analysis is incomplete and erroneous. 20 C.F.R.
 25 §§ 404.1520, .1535, 416.920, .935; SSR 82-62.

26 **2. Past Relevant Work**

27 At step four, the ALJ found, "[e]ven with his
 28 ["moderate"] social functioning limitations, the claimant could still
 29 return to and perform any one of his past work activities, as
 30 interaction with others including the public, co-workers and
 31 supervisors, is limited." (Tr. 23.) The ALJ did not provide a
 32 detailed explanation of the physical and mental demands of

1 Plaintiff's past jobs as a landscape laborer, restaurant busboy,
2 janitor, cashier, cook or delivery driver to support his finding
3 that Plaintiff could still perform all of these jobs. *Pinto*, 249
4 F.3d at 845. Further, the evidence in the record does not support
5 this determination. Medical professionals Donna Poole and Barbara
6 Tritt observed Plaintiff's mental health issues were interfering
7 with his ability to work. (Tr. 219, 424.) More significantly, Dr.
8 Brown found Plaintiff's psychological impairments made him
9 unemployable. (Tr. 369, 374.) These opinions do not support the
10 ALJ's conclusory finding that Plaintiff could perform his past work
11 in spite of his severe mental impairments. Further, the ALJ's
12 conclusion that Plaintiff's past jobs required limited interaction
13 with others, including the public, without reference to the DICOT or
14 vocational expert testimony is unsupported by substantial evidence
15 in the record and requires remand.

16 **E. Step Five - Use of the Medical Vocational Guidelines**

17 It appears the ALJ proceeded to step five and made alternative
18 step five findings by applying the Medical-Vocational Guidelines
19 (Grids). (Tr. 24.) At step five, the burden shifts to the
20 Commissioner to show that (1) the claimant can perform other
21 substantial gainful activity; and (2) a "significant number of jobs
22 exist in the national economy" which claimant can perform. *Kail v.*
23 *Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984). The Grids were adopted
24 by the Commissioner to improve the efficiency and uniformity of
25 Social Security benefits proceedings. *Desrosiers v. Secretary of*
26 *Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). Their
27 use was upheld as valid in *Heckler v. Campbell*, 461 U.S. 458 (1983).
28 The use of the Grids is appropriate where "a claimant's functional

1 limitations fall into a standardized pattern accurately and
2 completely described by the Grids." *Tackett*, 180 F.3d at 1103
3 (citing *Desrosiers*, 846 F.2d at 577). "Significant non-exertional
4 impairments make reliance on the Grids inappropriate." *Desrosiers*,
5 846 F.2d at 577. Non-exertional limitations are those that do not
6 depend on an individual's physical strength, such as mental,
7 sensory, manipulative and environmental limitations. *Cooper v.*
8 *Sullivan*, 880 F.2d 1152, 1155 n.7 (9th Cir. 1989). Where non-
9 exertional limitations exist, "the ALJ must examine independently
10 the additional adverse consequences resulting from the
11 nonexertional impairment." *Id.* at 1156. The Grids then are used
12 as a "framework," because alone, the Grids do not fully describe
13 the claimant's abilities and limitations. *Tackett*, 180 F.3d at
14 1102; *SSR* 86-8. If the limitation is slight, use of the Grids is
15 appropriate. *Id.*

16 Here, the ALJ concluded that application of the Grids was
17 appropriate after finding Plaintiff's non-exertional social
18 limitations "have little or no effect on the occupational base."
19 (Tr. 24.) This finding, without further explanation, is
20 inconsistent with the ALJ's earlier finding that "[i]f claimant
21 stopped the substance use, the remaining limitations would cause
22 more than a minimal impact on [his] ability to perform basic work
23 activities." (Tr. 22, Finding 5.) Further, by definition,
24 limitations caused by Plaintiff's "severe" mental impairments are
25 non-exertional. *SSR* 85-15. ("Mental impairments are generally
26 considered to be non-exertional, but depressions and conversion
27 disorders may limit exertion.") Since Dr. Brown found "marked"
28 limitations in Plaintiff's social functioning due to mental

1 impairments and without the effects of substance abuse, and this
2 opinion was not properly rejected, a finding of "little or no
3 effect" on the occupational base is unsupported by the evidence.
4 The use of the Grids alone was not appropriate. Rather, the ALJ
5 must make an individualized examination of Plaintiff's ability to
6 work, based on a new RFC without the effects of substance abuse,
7 and vocational expert testimony as to the jobs available and
8 Plaintiff's suitability for each job identified.

9 Without vocational expert testimony regarding job
10 classification and availability, the demands of identified jobs, and
11 the effects of all Plaintiff's non-exertional mental limitations on
12 his ability to perform identified jobs, there is not substantial
13 evidence to meet the Commissioner's burden of proof at step five.
14 See *Tackett*, 180 F.3d at 1103; *SSR* 85-15. The ALJ's failure to use
15 the services of a vocational expert to assess the effects of
16 Plaintiff's non-exertional limitations on his occupational base at
17 step five is reversible error.

18 **CONCLUSION**

19 The Commissioner's sequential evaluation in the context of
20 substance abuse is error. The determination that Plaintiff is not
21 disabled is not supported by substantial evidence and is based on
22 legal error. On remand, vocational expert testimony and additional
23 findings are necessary to determine the issue of disability.
24 Accordingly,

25 **IT IS ORDERED:**

26 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
27 **GRANTED** and the matter is remanded to the Commissioner for
28 additional proceedings consistent with the decision above and

1 pursuant to sentence four of 42 U.S.C. § 405(g);

2. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is

3 **DENIED**;

4. Application for attorney's fees may be filed by separate
5 motion.

6 The District Court Executive is directed to file this Order and
7 provide a copy to counsel for Plaintiff and Defendant. Judgment
8 shall be entered for **PLAINTIFF** and the file shall be **CLOSED**.

9 DATED May 16, 2007.

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S/ CYNTHIA IMBROGNO
12 UNITED STATES MAGISTRATE JUDGE
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